Supreme Court, U.S.
FILED
MAR 31 1995
OFFICE OF THE CLERK

No. 94-12

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA,
*Petitioner,*

VS.

STATE OF FLORIDA, ET AL.,
*Respondent.*

**On Writ of Certiorari**
**To the United States Court of Appeals**
**For the Eleventh Circuit**

## Brief of *Amici Curiae* San Manuel Band of Mission Indians, Rumsey Indian Rancheria of Wintun Indians, Jackson Rancheria Band of Miwuk Indians, Table Mountain Rancheria of California, Table Bluff Reservation of Wiyot Indians of California, Guidiville Band of Pomo Indians of the Guidiville Rancheria and Viejas Band of Kumeyaay Indians

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March 31, 1995

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

# TABLE OF CONTENTS


| | | Page |
|---|---|---|
| Table of Authorities | | ii |
| I. | Interest of Amici Curiae | 1 |
| II. | Summary of Argument | 2 |
| III. | Argument | 6 |
| | A. IGRA Unmistakably Subjects States to Suit in Federal Court | 6 |
| | B. The Eleventh Amendment Reflects The States' Common Law Sovereign Immunity But Creates No New Substantive Rights | 10 |
| | C. The States Surrendered Their Sovereignty Over Indian and Interstate Commerce to the Federal Government Under the Plan of the Convention | 13 |
| | D. Congress Clearly Had the Power to Abrogate State Immunity in IGRA in Order to Effectuate Its Indian and Interstate Commerce Clause Authority | 17 |
| | E. Any Balancing of Federal and State Interests to Determine Whether Congress Has the Power to Abrogate the States' Sovereign Immunity Must be Concluded in Petitioner's Favor | 18 |
| IV. | Conclusion | 30 |

## TABLE OF AUTHORITIES

### Cases


Page

*A&P Tea Co., Inc. v. Cottrell*, 424 U.S. 366, 96 S.Ct. 923 (1976) ..... 16

*Arizona v. California*, 460 U.S. 605, 103 S.Ct. 1382 (1983) 26

*Arizona v. Rumsey*, 467 U.S. 203, 104 S.Ct. 2305 (1984) 28

*Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142 (1985) .....6, 9, 18, 19, 27

*Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 55 S.Ct. 497 (1935) ..... 16

*Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 111 S.Ct. 2578 (1991) .....3, 9, 12, 15, 25, 27

*California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083 (1987) .....4, 28

*Cheyenne River Sioux Tribe v. South Dakota*, 830 F. Supp. 523 (D. S.D. 1993) *aff'd* 3 F.3d 273 (8th Cir. 1993) .. 29

*Chisholm v. Georgia*, 2 U.S. (Dall.) 419 (1973) ... 2, 10, 11, 14

*Clark v. Barnard*, 108 U.S. 436, 2 S.Ct. 878 (1883) ..... 19

*County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226, 105 S.Ct. 1245 (1985) ..... 28

*Dean Milk Co. v. Madison*, 340 U.S. 349, 71 S.Ct. 295 (1951) .....16

*Dellmuth v. Muth*, 491 U.S. 223, 109 S.Ct. 2397 (1989) 6, 9, 12

*Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347 (1974) .....11, 19, 20, 21, 28

*Edgar v. MITE Corp.*, 457 U.S. 624, 102 S.Ct. 2629 (1982) 16

*Employees of the Dept. of Public Health and Welfare v. Department of Public Health and Welfare*, 411 U.S. 279, 93 S.Ct. 1614 (1973) .....6, 9, 11, 15, 21, 28

*Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908) ..19, 20, 21

*Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666 (1976) 19

*Fox v. Morton*, 505 F.2d 254 (9th Cir. 1974) ..... 26




## TABLE OF AUTHORITIES

### CASES


Page

*Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005 (1985) ..... 28

*Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) .....14, 15

*Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970) ... 21

*Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848 (1971) 21

*Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 64 S.Ct. 873 (1944) ..... 10

*Green v. Mansour*, 474 U.S. 64, 106 S.Ct. 423 (1986) ...19, 20

*Hagen v. Utah*, ____ U.S. ____, 114 S.Ct. 958 (1994) ... 26

*Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504 (1890) .....11, 13

*Hodel v. Indiana*, 452 U.S. 314, 101 S.Ct. 2376 (1981) ... 16

*Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434 (1977) ..... 16

*Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565 (1978) ..... 19

*Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 94 S.Ct. 1879 (1974) ..... 16

*Kickapoo Tribe of Indians v. Kansas*, 818 F. Supp. 1423 (D. Kan. 1993) ..... 8, 9

*Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457 (1949) ..... 10

*Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27, 100 S.Ct. 2009 (1980) ..... 16

*Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 96 S.CT. 1634 (1976) .....5, 25, 26

*Monaco v. Mississippi*, 292 U.S. 313, 54 S.Ct. 745 (1934) 3, 14

*Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474 (1974) .. 16

*Nance v. Envt'l Protection Agency*, 645 F.2d 701 (9th Cir. 1981) ..... 26

*Navajo Tribe of Indians v. United States*, 624 F.2d 981 (Ct. Cl. 1980) ..... 26

## TABLE OF AUTHORITIES

### CASES


Page

*Parden v. Terminal Railway of the Alabama State Docks Dept.*, 377 U.S. 184, 84 S.Ct. 1207 (1964) . . 10, 14, 15, 19, 27

*Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900 (1984) . . . . . 12, 19, 28

*Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273 (1989) . . . . . 10, 13, 14, 19, 23, 27

*Poarch Band of Creek Indians v. Alabama*, 776 F. Supp. 550 (S.D. Ala. 1991) . . . . . 8

*Ponca Tribe of Oklahoma v. Oklahoma*, 37 F.3d 1422 (10th Cir. 1994) . . . . . 8

*Ponca Tribe of Oklahoma v. Oklahoma*, 834 F. Supp. 1341 (W.D. Okla. 1992) . . . . . 8

*Port Authority Trans-Hudson Corporation v. Feeney*, 495 U.S. 299, 110 S.Ct. 1868 (1990) . . . . . 3, 28

*Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 423 (1985) . . . . 12, 28

*Quill Corp. v. North Dakota*, ____ U.S. ____, 112 S.Ct. 1904, 1909 (1992) . . . . . 15

*Sault Ste. Marie Tribe of Chippewa Indians v. State*, 800 F. Supp. 1484 (W.D. Mich. 1992) . . . . . 8

*Seminole Nation v. United States*, 316 U.S. 286, 62 S.Ct. 1049 (1942) . . . . . 26

*Seminole Tribe of Florida*, 11 F.3d 1016 (11th Cir. 1994) 8

*Southern Pacific Co. v. Arizona*, 325 U.S. 761, 65 S.Ct. 1515 (1945) . . . . . 16

*Spokane Tribe of Indians v. Washington*, 28 F.3d 991 (1994) . . . . . 8, 9

*Sycuan v. Roache*, 788 F. Supp. 1498 (S.D. Ca 1992), *aff'd* at 38 F.3d 402 (9th Cir. 1994) . . . . . 24

*Table Mountain Band of Indians of the Table Mountain Rancheria v. Magarian*, No. 91-600 (E.D. Cal. Nov. 9, 1991) . . . . . 24




## TABLE OF AUTHORITIES

### CASES


Page

*United States v. Minnesota*, 270 U.S. 181, 46 S.Ct. 298 (1926) . . . . . 25

*United States v. Texas*, 143 U.S. 621, 12 S.Ct. 488 (1892) 25

*United States v. Wright*, 53 F.2d 300 (4th Cir. 1931) . . . . . 24

*Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 107 S.Ct. 2941 (1987) . . . . . 3, 6, 18, 28

*Willis v. Fordice*, 850 F.Supp. 523 (S.D. Miss. 1994) . . . . . 8


### CONSTITUTION


U.S. Constitution

Preamble . . . . . 23

Article I, § 9 . . . . . 16

Article III, § 2 . . . . . 10


### STATUTES


United States Code

Title 20, Section 1400 . . . . . 9

Title 25

Section 2701 . . . . . 2

Section 2701(4) . . . . . 25

Section 2710(d)(3)(C)(I) . . . . . 29

Section 2710(d)(7) . . . . . 4, 7, 9, 17, 26

TABLE OF AUTHORITIES

STATUTES


| | Page |
|---|---|
| Title 28, Section 1362 | 9 |
| Title 29 | |
| Section 216(b) | 9 |
| Section 794a(a) | 9 |


OTHER AUTHORITIES


S. Rep. No. 446, 100th Cong., 2d Sess. 1 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071 ..... 8, 14, 24

F. Cohen, Handbook of Federal Indian Law, at 39 (1941) 24

The Federalist No. 6, at 59-60 (A. Hamilton) Rossiter ed. 1961 ..... 23

The Federalist No. 3, at 44 (J. Jay) ..... 23

Lile, Some Views on the Rule of Stare Decisis, 4 VaL.Rev. 95 (1916) ..... 28


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## I.
## Interest of Amici Curiae

This brief of amici curiae San Manuel Band of Mission Indians, Rumsey Indian Rancheria of Wintun Indians, Jackson Rancheria Band of Miwuk Indians, Table Mountain Rancheria of California, Table Bluff Reservation of Wiyot Indians of California, Guidiville Band of Pomo Indians of the Guidiville Rancheria, and Viejas Band of Kumeyaay Indians (hereinafter collectively the "Tribes"),

is filed in support of petitioner Seminole Tribe of Florida pursuant to the written consent of all parties. The Tribes are all federally recognized Indian tribes whose reservations are located within the geographical boundaries of the State of California. Many of the amici Tribes depend on gaming on their reservations for tribal governmental revenue and to promote tribal economic development, tribal self-sufficiency, and strong tribal governments. Several other amici Tribes are in the process of developing gaming on their reservations to achieve these benefits. If states are permitted to assert a sovereign immunity defense to actions brought to enforce tribes' rights under the Indian Gaming Regulatory Act, 25 U.S.C. sections 2701-21 (hereinafter "IGRA" or the "Act"), the Tribes believe they will be prevented from realizing the tribal self-sufficiency and economic development Congress intended IGRA to afford.

## II.
## Summary of Argument

This brief examines Congress' power to abrogate the states' sovereign immunity when legislating under the Indian and interstate commerce clauses, and argues that Congress clearly and successfully exercised such power in IGRA.

In *Chisholm v. Georgia*, 2 U.S. (Dall.) 419 (1793), the Court misconstrued Article III as providing a blanket waiver of the states' immunity. The Eleventh Amendment corrected *Chisholm*'s error, instructing federal courts that Article III was not to be construed as waiving the states' immunity. In doing so, the Eleventh Amendment necessarily recognized the existence of that immunity, which is an inherent component of the states' common law sovereignty.

The Amendment did not, however, render the states' immunity inviolable. A state's assertion of immunity in any given instance is still open to challenge, requiring a determination of whether it can be overcome by a meritorious claim of consent, which may be manifested either directly, by means of a waiver, or, as in the case of Congress' abrogation pursuant to the exercise of its plenary powers, through the plan of the convention. *See, e.g., Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 779, 111 S.Ct. 2578, 2581 (1991); *Port Authority Trans-Hudson Corporation v. Feeney*, 495 U.S. 299, 310-11, 110 S.Ct. 1868, 1875 (1990) (Brennan, J., concurring); *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 474, 107 S.Ct. 2941, 2946 (1987) (Powell, J.). While the states did not cede their sovereignty — or its corollary immunity — to tribes under the plan of the convention, *Blatchford*, 501 U.S. at 775, 11 S.Ct. at 2578, the states did cede their sovereignty to the federal government to the extent necessary for Congress to effectuate its constitutional powers. *See, e.g., Monaco v. Mississippi*, 292 U.S. 313, 322-23, 54 S.Ct. 745, 747-48 (1934). The existence and recognition of those powers — here, the Indian and interstate commerce clauses — supports the conclusion that Congress successfully abrogated state immunity in IGRA to either: (1) implement a court-supervised scheme to move IGRA's class III compact process into a meaningful negotiating environment between tribes and states; or (2) to determine that a state has no interest in further participation and direct the tribe to seek class III rules from the Secretary of the Interior.

When Congress clearly states its intent to abrogate state immunity — as it unmistakably did in IGRA — and legislates pursuant to its plenary powers over Indian and interstate commerce, the claim of abrogation overcomes a state's immunity defense. This is particularly true where, as in IGRA, the statute only abrogates the states' immunity to determine the posture of the parties or, at best, to provide equitable relief with respect to prospective federal procedures. Nothing in the text, history, or this Court's interpre-

tation of the Eleventh Amendment suggests that under those circumstances the states' immunity would have inviolable constitutional protection.

Prior to IGRA, states played virtually no role in regulating Indian gaming. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 210-11, 107 S.Ct. 1083, 1089 (1987). After forcefully and successfully lobbying Congress, states won the right in IGRA to participate, through good faith negotiations with tribes, in regulating Indian gaming under the mechanism of Tribal-State compacts. Congress recognized, however, the virtual veto power IGRA could give to states over class III gaming if compacts are required without some safeguards against negotiating impasses. Federal court supervision in the event the negotiating process stalled — or worse, was never begun — was the reasonable answer Congress chose. That way, if a state elected not to negotiate, or did so on a basis which was determined to be overreaching or unreasonable, and persisted in maintaining that posture, the tribe could be freed of the compact requirement and could turn to the Secretary of the Interior for compact-equivalent procedures. *See* 25 U.S.C. § 2710(d)(7)(B).

Under IGRA, states are under no obligation to regulate Indian gaming or appear in federal court to defend against a tribal claim of failure to negotiate, or bad faith negotiation, if the state does not wish to do so. *The availability of a federal forum under IGRA is solely for the state's protection to determine, in a way that assures due process to the state but obviously provides nothing to the Tribe except further delay, whether in fact the state desires to negotiate a compact with the Tribe.* IGRA provides no penalty whatsoever for states that decline the Act's regulatory or judicial invitations. The compact process represents an opportunity for the states to expand the scope of their sovereign powers rather than an intrusion on those powers as the Eleventh



Circuit held. The lack of such an intrusion and the paramount need for Congress to be able to move its chosen process along — and in doing so to fulfill its mandate to regulate Indian gaming — sufficiently supports congressional authority to abrogate state immunity.

Moreover, even if the Court were to balance federal and state interests to determine whether Congress had the power to abrogate the states' sovereign immunity in IGRA, Congress' abrogation power must be upheld. First, the federal government's interest in preserving peace among the sovereigns existing within its borders requires IGRA's abrogation of state immunity. Second, the federal government's interest in promoting Indian self-sufficiency, and the rationale of *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 96 S.Ct. 1634 (1976), also compels abrogation of state immunity. Third, the federal government's trust responsibility to Indian tribes demands that any abrogation of immunity in IGRA apply equally to states and tribes. Fourth, no special justification exists in this case to deviate from this Court's numerous decisions which have both held and assumed that Congress' plenary Article I powers are sufficient to overcome the states' sovereign immunity, given a clear expression of congressional intent. Finally, the states' minimal interest, if any, in regulating activities in Indian country were more than adequately protected in this case by the national political process.

For all of these reasons, amici curiae Tribes submit that the Indian and interstate commerce clauses empower Congress to subject the states to suit in federal court for the limited purpose of determining which forum — negotiations with states or consultations with the Secretary of the Interior — tribes will be directed to in pursuing the gaming activities Congress envisioned under the Act. Amici respectfully request that the Court reverse the Eleventh Circuit's

opinion and judgment, which is reported at 11 F.3d 1016 (11th Cir. 1994).

## III.
## Argument

### A. IGRA Unmistakably Subjects States to Suit in Federal Court

Beginning with *Employees of the Dep't of Pub. Health and Welfare v. Dep't of Pub. Health and Welfare*, 411 U.S. 279, 93 S.Ct. 1614 (1973), this Court has consistently applied the "clear statement" rule to determine whether or not Congress intended to abrogate state sovereign immunity in a particular statute. The Court has required that Congress express its intention to abrogate state immunity "in unmistakable language in the statute itself." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243, 105 S.Ct. 3142, 3148 (1985). *See also Welch v. State Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 474, 107 S.Ct. 2941, 2996 (1987). Without such a clear statement of congressional intent, questions concerning the validity of Congress' exercise of its abrogation power are moot. While Congress' intent must be unmistakably clear, it need not use magic words — that is, the standard "does not preclude congressional elimination of sovereign immunity in statutory text that clearly subjects states to suit for monetary damages, though without explicit reference to state sovereign immunity or the Eleventh Amendment." *Dellmuth v. Muth*, 491 U.S. 223, 233, 109 S.Ct. 2397, 2403 (1989) (Scalia, J., concurring).



IGRA unmistakably provides Tribes with a federal claim for equitable relief against states that have either failed to participate in class III negotiations or have done so in bad faith:

> The United States district court shall have jurisdiction over — (i) any cause of action initiated by an Indian tribe arising from the failure of a state to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith.

25 U.S.C. § 2710 (d)(7)(A)(i).[1] The Act also provides evidentiary thresholds relating to (1) failing to reach a compact within 180 days, or (2) failing to respond to a request for compact negotiations, or not responding in good faith. *See* 25 U.S.C. § 2710(d)(7)(B). Upon showing any of the foregoing, the burden shifts to the state to prove its good faith. *Id.*[2] Thus, IGRA provides not only federal

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[1] Section 2710(d)(7)(A) provides for federal jurisdiction over three types of lawsuits:

> The United States district court shall have jurisdiction over —
>
> (i) any cause of action initiated by an Indian tribe arising from the failure of a state to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,
>
> (ii) any cause of action initiated by a state or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and
>
> (iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

25 U.S.C. § 2710 (d)(7)(A).

[2] IGRA's Senate Report provides Congress' rationale for subjecting states to suit:

> Section 11(d)(7) grants a tribe the right to sue a state if compact negotiations are not concluded. This section is the result of the Committee balancing the interests and rights of tribes to engage in

jurisdiction over actions against states, but sets forth the elements of, and evidentiary standards for, such suits. *See* 25 U.S.C. § 2710(d)(7).

The court below correctly recognized that Congress clearly intended to subject the states to suit in federal court under IGRA. *See Seminole Tribe of Florida*, 11 F.3d 1016, 1024 (11th Cir. 1994). Every other federal court to address the issue has reached the same conclusion. *See Ponca Tribe of Oklahoma v. Oklahoma*, 37 F.3d 1422, 1428 (10th Cir. 1994); *Spokane Tribe of Indians v. Washington*, 28 F.3d 991, 994-95 (1994); *Ponca Tribe of Oklahoma v. Oklahoma*, 834 F. Supp. 1341, 1345 (W.D. Okla. 1992); *Kickapoo Tribe of Indians v. Kansas*, 818 F. Supp. 1423, 1427 (D. Kan. 1993); *Sault Ste. Marie Tribe of Chippewa Indians v. State*, 800 F. Supp. 1484, 1488-89 (W.D. Mich. 1992); *Poarch Band of Creek Indians v. Alabama*, 776 F. Supp. 550, 558 (S.D. Ala. 1991). *See also Willis v. Fordice*, 850 F. Supp. 523, 530 (S.D. Miss.1994) (assuming

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gaming against the interests of states in regulating such gaming. Under this act, Indian tribes will be required to give up any legal right they may now have to engage in class III gaming if: (1) they choose to forgo gaming rather than to opt for a compact that may involve state jurisdiction; or (2) they opt for a compact and, for whatever reason, a compact is not successfully negotiated. In contrast, states are not required to forgo any state governmental rights to engage in or regulate class III gaming except whatever they may voluntarily cede to a tribe under a compact. Thus, given this unequal balance, the issue before the Committee was how best to encourage states to deal fairly with tribes as sovereign governments. The Committee elected, as the least offensive option, to grant tribes the right to sue a state if a compact is not negotiated and chose to apply the good faith standard as the legal barometer for the state's dealings with tribes in class III gaming negotiations.

S. Rep. No. 446, 100th Long., 2d Sess., 1, 14 (1988) *reprinted in* 1988 U.S. Code Long & Admin. News 3071, 3084 (hereinafter "Senate Report").



validity of IGRA's provisions for federal jurisdiction over suits against the states).

The unmistakable clarity with which Congress expressed its intent in IGRA to submit the states to federal court jurisdiction is distinguishable from the statutes which have been at issue in many of the leading Eleventh Amendment cases. *Cf. Blatchford*, 501 U.S. 775, 111 S.Ct. 2578 (interpreting 28 U.S.C. § 1362); *Dellmuth*, 491 U.S. 223, 109 S.Ct. 2397 (interpreting the Education of the Handicapped Act, 20 U.S.C. § 1400, *et seq.*); *Atascadero*, 473 U.S. at 245, 105 S.Ct. at 3149 (interpreting the Rehabilitation Act, 29 U.S.C. § 794a(a)(2)); *Employees*, 411 U.S. 279, 93 S.Ct. 1614 (interpreting the Fair Labor Standards Act, 29 U.S.C. § 216(b)).

In *Spokane Tribe*, the Ninth Circuit explained that:

> The tribe's suit and the federal court's jurisdiction are triggered under [section 2710(d)(7)(A)(i)] by the particular state's failure to negotiate in good faith. *The state is the only possible defendant to such a suit, and it is the only other party to the compact negotiations.* Congress fully contemplated and expressed its desire to give the tribes a federal forum by which they could compel the states to negotiate fairly with them. This is not just a permissible inference; it is the only reasonable inference .... *Short of mentioning the Eleventh Amendment or sovereign immunity, a clearer statement of the intent to abrogate is difficult to envision.*

*Spokane Tribe of Indians*, 28 F.3d at 995 (*quoting Kickapoo Tribe*, 818 F. Supp. at 1427) (emphasis added). Given the clarity of Congress' intention to abrogate state sovereign immunity, the question is whether, in enacting IGRA, it was empowered to do so.

## B. The Eleventh Amendment Reflects The States' Common Law Sovereign Immunity But Creates No New Substantive Rights

The immunity at issue here is fundamental to the nature of states as political entities: "[A] state's immunity from suit by a citizen without its consent has been said to be rooted in 'the inherent nature of sovereignty . . . .'" *Parden v. Terminal Railway of the Alabama State Docks Dept.*, 377 U.S. 184 191, 84 S.Ct. 1207, 1212 (1964) (*quoting Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 51, 64 S.Ct. 873, 875 (1944)). "[T]he doctrine of sovereign immunity, for states as well as for the Federal Government, was part of the understood background against which the Constitution was adopted . . ." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 31-32, 109 S.Ct. 2273, 2297 (1989) (Scalia, J., concurring in part and dissenting in part).

Article III's grant of judicial power over suits "between a state and Citizens of another state," initially raised doubts about the continued existence of state sovereign immunity. *See* U.S. Const., art. III, § 2.[3] In *Chisholm*, the Court read Article III as if it constituted a general waiver of the states' sovereign immunity. *Chisholm* was reversed with "vehement speed" by the Eleventh Amendment.[4] *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 708, 69 S.Ct. 1457, 1470 (1949). Having been misinterpreted by *Chisholm*, Article III's original meaning was restored by the Eleventh Amendment: "The Eleventh Amendment served effectively to reverse the particular holding in *Chisholm*, and, more generally to restore the original understanding," namely, that the states retained their sovereignty in those areas not delegated to the federal government. *Employees*, 411 U.S. 279, 291-92, 93 S.Ct. 1614, 1621 (1973) (Marshall, J., concurring). *See also Edelman v. Jordan*, 415 U.S. 651, 662, 94 S.Ct. 1347, 1355 (1974) ("Sentiment for passage of a constitutional amendment to override the decision rapidly gained momentum, and five years after *Chisholm* the Eleventh Amendment was officially announced by President John Adams").

[3] Article III, section 2 provides:

> The judicial Power shall extend to all Cases, In Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies to which the United States shall be a Party; to Controversies between two or more states; between a state and Citizens of another state; between Citizens of different states; between Citizens of the same state claiming Lands under Grants of different states, and between a state, or the citizens thereof, and foreign states, Citizens or Subjects.

U.S. Const., art. III, § 2.

[4] The Eleventh Amendment provides that: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by Citizens or subjects of any foreign state."



Article III — both before *Chisholm* and after the Eleventh Amendment — merely allows federal courts to hear suits involving a state when such suits are otherwise cognizable. But in determining the scope of what is cognizable, arguments that the classifications of cases enumerated in either Article III or the Eleventh Amendment are limiting factors generally have been rejected. *See Hans v. Louisiana*, 134 U.S. 1, 14, 10 S.Ct. 504, 507 (1890) (Article III, section 2 " 'can have no operation but this: to give a citizen a right to be heard in the federal courts, and, if a state should condescend to be a party, this court may take cognizance of it' ") (*quoting* Madison in 3 Elliot, Debates, 533). Thus the Court has recognized that:

> Despite the narrowness of its terms, since *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed.2 842 (1890), we have understood the Eleventh Amendment to stand not so much for what it says, *but for the presupposition of our constitutional structure which it*

> *confirms:* that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty (citations) . . . and that a State will therefore not be subject to suit in federal court *unless it has consented to suit, either expressly or in the "plan of the convention.*

*Blatchford*, 501 U.S. at 799, 111 S.Ct. at 2581 (emphasis added).

Indeed, this Court has consistently held that: (1) the Eleventh Amendment "confirms,"[5] "exemplifi[es],"[6] and "affirm[s],"[7] the fundamental principle that state sovereign immunity survived the states' ratification of the Constitution; (2) Article III's grant of judicial authority is limited by that immunity; and (3) the immunity cannot be overcome unless the state has consented to suit or Congress has abrogated state immunity in unmistakenly clear language. *Union Gas*, 491 U.S. at 7, 109 S.Ct. at 2277 (Brennan, J., plurality). Those are the fundamentals "reflected" in, *though not created by*, the Eleventh Amendment. *Id.* Indeed, because the Eleventh Amendment itself may be viewed as simply reflecting the states' common law immunity, rather than giving birth to a new immunity, it therefore may be a misnomer to refer, as is common, to an "Eleventh Amendment immunity" or an "Eleventh Amendment defense." *See, e.g., Quern v. Jordan*, 440 U.S. 332, 343, 99 S.Ct. 423, 425 (1985); *Delmuth*, 491 U.S. at 225, 109 S.Ct. at 2398. All that is really meant by such references is that the state has asserted its common law immunity from suit under its sovereign powers reflected in the Eleventh Amendment; no more, no less. The Eleventh Amendment thus

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[5] *Blatchford*, 501 U.S. at 799, 111 S.Ct. at 2581.

[6] *Ex Parte New York*, 256 U.S. 490, 497, 41 S.Ct. 588, 589 (1921).

[7] *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98, 104 S.Ct. 900, 906-07 (1984).



serves as a shorthand reference to the states' traditional defense of sovereign immunity. Put another way, the Eleventh Amendment only addresses a subset of the entire set of cases in which states may have a sovereign immunity defense. For this reason, Hans and its progeny do not rely solely on the Eleventh Amendment's narrow terms, but instead rest on the broad concept of common law sovereign immunity of which the Amendment is but a reflection:

> [I]n the landmark case of *Hans v. Louisiana*, the Court unanimously rejected this "comprehensive" approach to the [Eleventh] Amendment, finding sovereign immunity where not only a nondiversity basis of jurisdiction was present, *but even where the parties did not fit the description of the Eleventh Amendment*, the plaintiff being a citizen not of another state or country, but of Louisiana itself. What we said in *Hans* was, essentially, that *the Eleventh Amendment was important not merely for what it said but for what it reflected*: a consensus that the doctrine of *sovereign immunity, for states as well as for the Federal Government, was part of the understood background against which the Constitution was adopted*, and which its jurisdictional provisions did not mean to sweep away.

*Union Gas*, 491 U.S. at 31-32, 109 S.Ct. at 2297 (Scalia, J., concurring in part and dissenting in part) (emphasis added).

Thus, while the Eleventh Amendment reflects the states' common law sovereign immunity, it does create any new substantive rights.

### C. The States Surrendered Their Sovereignty Over Indian and Interstate Commerce to the Federal Government Under the Plan of the Convention

It is well-settled that by ratifying the Constitution the states surrendered their common law sovereignty in areas

where Congress was granted express plenary powers. "States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, *save where there has been 'a surrender of this immunity in the plan of the convention.'*" *Monaco v. Mississippi*, 292 U.S. 313, 322-323, 54 S.Ct. 745, 747-48 (1934) (*quoting* The Federalist, No. 81) (emphasis added). *See also, Union Gas*, 491 U.S. at 33, 109 S.Ct. at 2298 (Scalia, J., concurring in part and dissenting in part) (*quoting Monaco*); *Parden*, 377 U.S. at 191, 84 S.Ct. at 1212 (1964) ("the states surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce").[8]

In his famous dissent in *Chisholm*, Justice Iredell drew the line demarcating the portion of sovereignty the states surrendered from that which they retained:

> Every state in the Union in every instance *where its sovereignty has not been delegated to the United States*, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. *The United States are sovereign as to all the powers of Government actually surrendered.* Each state in the Union is sovereign as to all the powers reserved.

*Chisholm*, 2 U.S. at 435 (Iredell, J., dissenting) (emphasis added). Thus Justice Iredell recognized that the states surrendered their sovereignty as to those powers expressly delegated to the Federal Government. Thirty years after *Chisholm*, the Court confirmed Justice Iredell's view. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). In *Gibbons*, the Court recognized that the states' surrender of sovereignty specifically encompassed the interstate commerce power:

> If, as has always been understood, the sovereignty of Congress, though limited to specified objects is plenary as to those objects, the power over commerce . . . among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.

*Gibbons*, 22 U.S. at 197. Similarly, in *Parden*, the Court recognized that "[b]y empowering Congress to regulate commerce . . . the states necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." *Parden*, 377 U.S. at 192, 84 S.Ct. at 1212. And in *Employees*, Justice Marshall noted that:

> The common-law doctrine of sovereign immunity in its original form stood as an absolute bar to suit against a state by one of its citizens, absent consent. But that doctrine was modified *pro tanto* in 1788 to the extent that the states relinquished their sovereignty to the Federal Government. At the time our Union was formed, the states, for the good of the whole, gave certain powers to Congress, including power to regulate commerce, and by so doing, they simultaneously subjected to congressional control that portion of their pre-existing common-law sovereignty which conflicted with those supreme powers given over to Congress.

*Employees*, 411 U.S. at 288, 93 S.Ct. at 1620 (Marshall, J., concurring).

It is well-settled that Congress has plenary power over both Indian and interstate commerce. *See Quill Corp. v. North Dakota*, ___ U.S. ___, 112 S.Ct. 1904, 1909 (1992) (interstate); *Blatchford*, 501 U.S. at 791, 111 S.Ct.

[8] Similarly, IGRA's Senate Report "recognize[d] and affirm[ed] the principle that by virtue of their original tribal sovereignty, tribes reserved certain rights when entering into treaties with the United States, and that today, tribal governments retain all rights that were not expressly relinquished." Senate Report at 5 (Additional Views of Mr. McLain).

at 587 (Indian); *Hodel v. Indiana*, 452 U.S. 314, 324, 101 S.Ct. 2376, 2383 (1981) (interstate); *Morton v. Mancari*, 417 U.S. 535, 551-52, 94 S.Ct. 2474, 2483-84 (1974) (Indian). The totality of the states' surrender of sovereignty over Indian and interstate commerce is apparent in light of the so-called "dormant" commerce clause. Article I, section 8, clause 3 of the Constitution is phrased as an affirmative grant of power to the federal government over commerce: it does not express any limitations whatsoever on the states' power to regulate commerce concurrently with the federal government. *Cf.* U.S. Const., art. I, § 9, cl. 5 (flatly prohibiting states from imposing export duties). Most of Congress' powers do not preclude concurrent state regulation, absent conflicting federal regulation. *See, e.g., Kewanee Oil Co v. Bicron Corp.*, 416 U.S. 470, 94 S.Ct. 1879 (1974) (Congress' power to issue patents does not bar states from granting different protection to inventors). In the area of commerce, however, the Court has often stricken state statutes regulating commerce even absent a conflicting federal statute. *See, e.g., Edgar v. MITE Corp.*, 457 U.S. 624, 102 S.Ct. 2629 (1982); *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27, 100 S.Ct. 2009 (1980); *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434 (1977); *A&P Tea Co., Inc. v. Cottrell*, 424 U.S. 366, 96 S.Ct. 923 (1976); *Dean Milk Co. v. Madison*, 340 U.S. 349, 71 S.Ct. 295 (1951); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 65 S.Ct. 1515 (1945); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 55 S.Ct. 497 (1935).

In sum, there can be little doubt that by ratifying the Constitution the states surrendered their common law sovereign powers to the Federal Government in the areas of Indian and interstate commerce.



### D. Congress Clearly Had the Power to Abrogate State Immunity in IGRA in Order to Effectuate Its Indian and Interstate Commerce Clause Authority

IGRA authorizes federal courts to hear three types of actions: (1) suits by Indian tribes against states for failing to negotiate a Tribal-State compact, or for failing to negotiate in good faith, *see* 25 U.S.C. § 2710(d)(7)(A)(i); (2) suits by states or tribes to enjoin class III gaming activity conducted in violation of a Tribal-State compact, *see id.* at § 2710(d)(7)(A)(ii); and (3) suits by the Secretary of the Interior to enforce procedures for class III gaming where the state has declined to consent to a Tribal-State compact selected through IGRA's mediation process, *see id.* at § 2710(d)(7)(A)(iii). Only the first category of suits is in issue here.

In light of Congress' unmistakable intent to abrogate state immunity in IGRA, and given the states total surrender of sovereignty over Indian and interstate commerce, discussed *supra* at sections III(A) and (C) of this brief, the question of Congress' power to authorize such suits becomes simply one of whether Congress' Article I powers are sufficient to support the statute. Although the Eleventh Circuit held that Congress only enacted IGRA under its Indian Commerce Clause power, and not its Interstate Commerce Clause power, the amici Tribes believe that both powers support the Act. *See* Brief of Amici Curiae National Indian Gaming Association, Minnesota Indian Gaming Association and California-Nevada Indian Gaming Association (interstate). *See also* Brief of Amici Curiae Stockbridge-Munsee Indian Community and the Oneida Nation of Wisconsin (Indian). Given Congress' plenary powers over Indian and interstate commerce, there can be little doubt that Congress had the authority to promulgate IGRA and impose its unique judicial remedies, particularly since those remedies are critical to the successful operation of gaming under the Act. More-

over, those remedies — which are limited to prospective equitable relief, *see* Brief of Amicus Poarch Band of Creek Indians — are designed primarily, if not solely, for the states' protection: that is, IGRA ensures that the states are afforded every opportunity to negotiate for regulatory authority over class III gaming which may impact commerce within their borders.

IGRA demonstrates congressional action in furtherance of its plenary powers over Indian and interstate commerce, which alone is sufficient to support the abrogation invoked under the Act. However, a more moderate approach to determining whether or not the exercise of congressional plenary powers is sufficiently compelling to overcome a state's inherent immunity — by weighing and balancing competing state and federal interests, *see, e.g, Union Gas*, 491 U.S. at 25-29, 109 S.Ct. 2287-89 (Stevens, J., concurring) — also leads to the conclusion that Congress had sufficient authority to abrogate state immunity under the Act. The amici Tribes submit that under IGRA there can be no doubt about Congress' power to abrogate state immunity even if a balancing test is imposed.

### E. Any Balancing of Federal and State Interests to Determine Whether Congress Has the Power to Abrogate the States' Sovereign Immunity Must be Concluded in Petitioner's Favor

This Court has acknowledged that sovereign immunity under the Eleventh Amendment is not an absolute bar to federal court jurisdiction over suits against the states: "The Court has recognized certain exceptions to the reach of the Eleventh Amendment." *Welch*, 483 U.S. at 473, 107 S.Ct. at 2946 (Powell, J., plurality). *See also Atascadero State Hospital*, 473 U.S. at 238, 105 S.Ct. at 3145 (noting "well-established exceptions" to the Eleventh Amendment). These exceptions include cases involving: (1) waiver by a



state; *see, e.g., Atascadero State Hospital*, 473 U.S. at 238-39, 105 S.Ct. at 3145-46; *Parden*, 377 U.S. at 186, 84 S.Ct. at 1210; *Clark v. Barnard*, 108 U.S. 436, 447, 2 S.Ct. 878, 883 (1883); (2) prospective equitable relief; *see Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908); *Edelman*, 415 U.S. at 663-64, 94 S.Ct. at 1356; *Green v. Mansour*, 474 U.S. 64, 106 S.Ct. 423 (1986); and (3) congressional abrogation in clear, unmistakable language; *see Union Gas*, 491 U.S. at 14-23, 109 S.Ct. at 2281-86 (Brennan, J., plurality); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 459, 96 S.Ct. 2666, 2673 (1976).

Because the Eleventh Amendment "implicates the fundamental constitutional balance between the Federal Government and the states," *Atascadero State Hospital*, 473 U.S. at 238, 105 S.Ct. at 3146, the Court has often weighed and balanced competing federal and state interests. *See Union Gas*, 491 U.S. at 25-29, 109 S.Ct. 2287-89 (Stevens, J., concurring). *See also Hutto v. Finney*, 437 U.S. 678, 691, 98 S.Ct. 2565, 2573-74 (1978). Thus the Court has recognized that the fiction of *Ex parte Young* "rests on the need to promote the vindication of federal rights . . . " *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104-106, 104 S.Ct. 900, 910-11 (1984). Similarly, *Edelman* involved an effort to "accommodate" the need for vindication of federal rights to the competing interest in the "immunity of the states." *Pennhurst*, 465 U.S. at 105, 104 S.Ct. at 910. And in Green, the Court explained:

> Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interests in assuring the supremacy of that law. But compensatory or deterrence

> interests are insufficient to overcome the dictates of the Eleventh Amendment.

*Green*, 474 U.S. at 68, 106 S.Ct. at 426 (citations omitted).

A brief review of the facts in *Edelman* may help illustrate the amici Tribes' point. *Edelman* was a class action against the state officials who administered federally-funded programs of Aid to the Aged, Blind or Disabled ("AABD"). The complaint charged that the state defendants improperly omitted certain eligibility months for which applicants were entitled to aid under federal law, and that the defendants did not timely process applications as required by federal regulations. While the complaint purportedly sought only declaratory and injunctive relief, that relief in effect included retroactive damages, for the prayer sought " 'a permanent injunction enjoining the defendants to award to the entire class of plaintiffs all AABD benefits wrongfully withheld.' " 415 U.S. at 656, 94 S.Ct. at 1352 (*quoting* complaint). The district court found for plaintiffs, issued "a permanent injunction requiring compliance with the federal time limits for processing and paying AABD applicants," and also ordered the defendants to retroactively pay the wrongfully-withheld benefits. 415 U.S. at 656, 94 S.Ct. at 1352. The Seventh Circuit affirmed. 472 F.2d 985 (7th Cir. 1973).

This Court recognized that prospective equitable relief was properly granted under *Ex parte Young*, but reversed the grant of retroactive payment of benefits. *Edelman*, 415 U.S. at 659, 94 S.Ct. at 1354. The Court found that "[t]he funds to satisfy the award in this case must inevitably come from the general revenues of the state of Illinois, and thus the award resembles far more closely the monetary award against the state itself, *Ford Motor Co. v. Department of Treasury, supra*, than it does the prospective injunctive relief awarded in *Ex parte Young*." *Id.* at 665, 94 S.Ct. at 1357.



The Court candidly acknowledged that the "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night." *Id.* at 667, 94 S.Ct. at 1357. The relief approved in *Ex parte Young* itself had an "effect on the state's revenues . . . [and] [l]ater cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young*." *Id.* at 667, 94 S.Ct. at 1357-58 (*citing Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970)). These impacts on the states' treasuries were acceptable because they were ancillary consequences of federal supremacy:

> [T]he fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young, supra*.

*Edelman*, 415 U.S. at 667-68, 94 S.Ct. at 1358.

Finally, the Court also employed this balancing approach in *Employees*, which was a suit by state employees against the Missouri Department of Public Health & Welfare for overtime compensation under the Fair Labor Standards Act of 1938, 29 U.S.C. section 216(b). The Court recognized that Congress intended to "bring under the Act employees of [state] hospitals and related institutions." *Employees*, 411 U.S. at 283, 93 S.Ct. at 1617. Yet the Court also found no evidence that Congress intended "to make it possible for

a citizen of that state or another state to sue the state in the federal courts." *Id.* at 285, 93 S.Ct. at 1618. The Court was thus unwilling "to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the states of an immunity they have long enjoyed under another part of the Constitution." *Id.* at 285, 93 S.Ct. at 1618.

Even absent clear statutory language submitting the states to suit in federal court, the Court nevertheless carefully balanced the competing federal and state interests in reaching its conclusion. Significantly, the Court noted that "[b]y holding that Congress did not waive the sovereign immunity of the states under the FLSA, we do not make the extension of coverage to state employees meaningless." *Id.* The Court explained that the section 16(c) of the FLSA "gives the Secretary of Labor authority to bring suit for unpaid minimum wages or unpaid overtime compensation under the FLSA . . . The policy of the Act so far as the states are concerned is wholly served by allowing the delicate federal-state relationship to be managed through the Secretary of Labor." *Id.* at 285-86, 93 S.Ct. at 1618-19. In other words, since Congress did not clearly state its intent to allow citizen suits against the states in federal court, and because the Secretary of Labor could fully effectuate the federal purposes behind the statute, federalism and federal supremacy did not require abrogation.

When we weigh the competing federal and state interests at stake in the area regulated by IGRA, however, there can be no doubt that the federal interests predominate, requiring abrogation of the states' immunity.



**1. The Federal Government's Fundamental Interest in Preserving Peace Among the Sovereigns Existing Within Its Borders Requires the Abrogation of the States' Immunity in IGRA**

A central function of our federal system is ensuring peace among the numerous sovereigns existing within the United States' borders. *See* U.S. Const., preamble ("We the People of the United states, in Order to . . . insure domestic tranquility"). *See also* The Federalist No. 6, at 59-60 (A. Hamilton) (Rossiter ed. 1961).[9] As Justice Scalia observed in *Union Gas*, there is an "inherent necessity of a tribunal for peaceful resolution of disputes between the Union and the individual states, and between the individual states themselves . . . " *Union Gas*, 491 U.S. at 33, 109 S.Ct. at 2298 (Scalia, J., concurring in part and dissenting in part). This federal function applies with equal force to disputes between Indian tribes and the states. *See* The Federalist No. 3 at 44 (J. Jay) ("Not a single Indian war has yet been produced by aggressions of the present federal government, feeble as it is; but there are several instances of Indian hostilities having been provoked by the improper

[9]Hamilton wrote that:

> So far is the general sense of mankind from corresponding with the tenets of those who endeavor to lull asleep our apprehensions of discord and hostility between the states, in the event of disunion, that it has from long observation of the progress of society become a sort of axiom in politics that vicinity, or nearness of situation, constitutes nations natural enemies. An intelligent writer expresses himself on this subject to this effect: "Neighboring nations [says he] are naturally enemies of each other, unless their common weakness forces them to league in a confederate republic, and their constitution prevents the differences that neighborhood occasions, extinguishing that secret jealousy which disposes all states to aggrandize themselves at the expense of their neighbors." This passage, at the same time, points out the evil and suggests the remedy.

The Federalist No. 6, at 59-60 (A. Hamilton).

conduct of individual states, who, either unable or unwilling to restrain or punish offenses, have given occasion to the slaughter of many innocent inhabitants"). Maintaining peace with Indian tribes has long been a goal of the Federal Government. *See* F. Cohen, Handbook of Federal Indian Law, at 39 (1941) ("Most of the very early treaties were treaties of peace and friendship").

This federal interest is particularly strong given the states' traditional hostility to Indian tribes. *See, e.g., United States v. Wright*, 53 F.2d 300 (4th Cir. 1931) (discussing North Carolina's pernicious anti-Indian discrimination).[10] Indeed, in enacting IGRA, Congress expressly "[r]ecogniz[ed] that the extension of state jurisdiction on Indian lands has traditionally been inimical to Indian interests . . . " Senate Report at 5. The states' hostility to Indian tribes has continued through the present day, and has appeared in the very area at issue in this case. For example, in *Sycuan v. Roache*, 788 F. Supp. 1498 (S.D. Ca 1992), *aff'd* at 38 F.3d 402 (9th Cir. 1994) (petition for rehearing under submission), state law enforcement officers, completely lacking in jurisdiction, conducted illegal raids on Indian lands to disrupt Tribal gaming operations. Amicus Curiae Table Mountain Rancheria suffered a similar illegal raid. *See Table Mountain Band of Indians of the Table Mountain Rancheria v. Magarian*, No. 91-600 (E.D. Cal. Nov. 9, 1991)

[10] As the Fourth Circuit noted:

> [T]he State of North Carolina has afforded [Indians] few of the privileges of citizenship. It has not furnished them schools, and forbids their attendance upon schools maintained for the white and colored people of the State. It will not receive their unfortunate insane or their deaf, dumb, or blind in State institutions. It makes no provision for their instruction in the arts of agriculture or for the care of their sick or destitute. It supervises their roads; but until comparatively recent years these were maintained by their own labor.

53 F.2d at 304-05.



(order granting temporary restraining order against Fresno County Sheriff and order to show cause re preliminary injunction).

Given the long and unfortunate history of animosity and mistrust between Tribes and states, neither group of sovereigns are likely to submit to the judicial jurisdiction of the other. Hence, if Tribal-State disputes regarding Indian gaming under IGRA are to be resolved peacefully, they must be resolved in the federal courts. Nowhere is the United States' peace-making role more significant. Thus this factor weighs heavily in favor of finding Congressional power to abrogate state immunity in IGRA.

### 2. The Federal Government's Interest in Promoting Indian Self-Sufficiency, and *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, Requires the Abrogation of the States' Immunity In IGRA

It is long-settled that the states are not immune from suit by the United States. *See United States v. Texas*, 143 U.S. 621, 12 S.Ct. 488 (1892). Nor are states immune from suits by the United States brought on behalf of Indian Tribes. *See United States v. Minnesota*, 270 U.S. 181, 195, 46 S.Ct. 298, 301 (1926).

In *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 96 S.Ct. 1634 (1976), this Court held that Indian Tribes' access to federal court to obtain equitable relief from state taxation was "as broad as that of the United States suing as the tribe's trustee." *Id.* at 473, 96 S.Ct. at 1641. *See also Blatchford*, 111 S.Ct. at 2583. Indian Tribes' ability to repel states' intrusions on tribal sovereignty by representing themselves furthers the federal policy of promoting tribal self-sufficiency — a goal which Congress expressly stated in IGRA. *See* 25 U.S.C. § 2701(4). As noted *supra*, IGRA authorizes Indian tribes to bring, and federal courts to

entertain, suits for equitable relief against the states for this very purpose. *See* 25 U.S.C. § 2710(d)(7). Thus *Moe's* holding appears to authorize the type of suit IGRA authorizes Tribes to bring against the states. This factor also weighs heavily in favor of Congress' abrogation power in IGRA.

### 3. The Federal Government's Trust Responsibility to Indian Tribes Requires That Any Abrogation of Immunity in IGRA Apply to the States as Well as to the Tribes

The Federal Government "has an overriding duty of fairness when dealing with Indians, one founded upon a relationship of trust for the benefit of" Indians. *Fox v. Morton*, 505 F.2d 254, 255 (9th Cir. 1974). *See Hagen v. Utah*, ____ U.S. ____, 114 S.Ct. 958, 971 n.1 (1994); *Arizona v. California*, 460 U.S. 605, 650, 103 S.Ct. 1382, 1407 (1983) (Brennan, J., concurring in part and dissenting in part); *Seminole Nation v. United States*, 316 U.S. 286, 296, 62 S.Ct. 1049, 1054 (1942). The Federal Government's actions toward Indian Tribes must meet the highest standards of fiduciary duty. *Nance v. Envt'l Protection Agency*, 645 F.2d 701, 710 (9th Cir. 1981).

The duty to protect Indian property rights inheres in the trust relationship between the Federal Government and Indians. *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980). In IGRA, Congress recognized that Indian tribes have property rights in Indian gaming: "Indian tribes have the *exclusive right* to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a state which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5).

Given the federal government's trust relationship with Indian tribes, for it to submit the Tribes to suit by the



States, without reciprocally submitting the States to suit by the Tribes, would constitute a breach of the trust relationship.

The Court's sensitivity to the importance of reciprocity in this area is evidenced in *Blatchford*, in which the Court was motivated, in part, by the fact that "[w]e have repeatedly held that Indian tribes enjoy immunity against suits by states, Potawatomi Indian Tribe, *supra*, 498 U.S., at ____, 111 S.Ct., at ____, as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender the tribes' immunity for the benefit of the states, we do not believe that it surrendered the states' immunity for the benefit of the tribes." *Id.* 501 U.S. at ____, 111 S.Ct. at 2583.

This factor also weighs heavily in favor of Congress' abrogation power in IGRA.

### 4. This Court's Precedents, and The Doctrine of Stare Decisis, Weigh in Favor of Congress' Abrogation Power in IGRA

For the Court to affirm the Eleventh Circuit in this case and hold that Congress lacks the power to abrogate the states' sovereign immunity when legislating under the Indian Commerce Clause, would require the Court to make a radical departure from its precedents. Specifically, it would require overruling *Union Gas* and *Parden*, 377 U.S. at 192, 84 S.Ct. at 1212 ("[b]y empowering congress to regulate commerce . . . the states necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation"). And it would require disapproving of numerous decisions that have recognized, or assumed, that Congress may abrogate the states immunity when legislating under its Article I powers. *Atascadero*, 473 U.S. at 242, 105 S.Ct. at 3147 (affirming that Congress may abrogate by

making its intention unmistakably clear); *Employees*, 411 U.S. at 285, 93 S.Ct. at 1618 (assuming Congress has power under the Commerce Clause to abrogate); *Quern*, 140 U.S. at 343, 19 S.Ct. at 1146; *Edelman*, 415 U.S. at 673, 94 S.Ct. at 1360; *Pennhurst*, 465 U.S. at 99, 104 S.Ct. at 907; *Port Authority Trans-Hudson Corporation v. Feeney*, 495 U.S. 299, 305, 110 S.Ct. 1868, 1872-73 (1990); *Welch*, 483 U.S. at 475, 107 S.Ct. at 2947; *County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226, 252, 105 S.Ct. 1245, 1261 (1985).

"The rule of law depends in large part on adherence to the doctrine of stare decisis. Indeed, the doctrine is 'a natural evolution from the very nature of our institutions.' " *Welch*, 483 U.S. at 479, 107 S.Ct. at 2948-49 (*quoting* Lile, *Some Views on the Rule of Stare Decisis*, 4 Va.L.Rev. 95, 97 (1916)). Thus "any departure from the doctrine of stare decisis demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S.Ct. 2305, 2311 (1984). There is no such "special" justification for reversing the cases cited *supra*. Thus, this factor also weighs in favor of Congress' abrogation power in IGRA.

**5. The States' Minimal Interest in Regulating Activities on Indian Lands Are Adequately Protected by the National Political Process**

The theory of protection for states articulated in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005 (1985), proved more than adequate in the case of IGRA. As noted above, prior to IGRA's enactment, the states had little or no regulatory jurisdiction over Indian gaming. *See Cabazon*, 480 U.S. at 208-211, 107 S.Ct. at 1087-89. Through the legislative process, the states effectively presented their concerns to Congress. *See* Senate Report at 1-2, 13, 33, 36. The result of this process, IGRA, provides the states with an unprecedented opportunity to expand their civil regulatory jurisdiction over gaming into



Indian country. *See* 25 U.S.C. § 2710(d)(3)(C)(I) (Tribal-State compacts governing class III gaming on Indian lands may include provisions applying state criminal and civil laws and regulations).

> There is no down side for the states in the process prescribed by IGRA: Under the IGRA, no penalties can be assessed against a state for failing to negotiate. What the state would lose by such a stance would be possible input into a Tribal-State gaming compact. If a state fails to negotiate, the Secretary of the Interior, after consultation with the Tribe, could then prescribe the procedures under which the Tribe could conduct Class III gaming on the Indian lands over which the Tribe has jurisdiction, and the state would lose its input into the process.

*Cheyenne River Sioux Tribe v. South Dakota*, 830 F. Supp. 523, (D. S.D. 1993), *aff'd* 3 F.3d 273 (8th Cir. 1993).

Thus, even this factor also weighs in favor of Congress' power to abrogate state immunity in IGRA.

## IV.

## CONCLUSION

For the reasons set forth herein, the amici Tribes respectfully request that the Court reverse the opinion and judgment of the Eleventh Circuit Court of Appeal that respondent State of Florida is entitled to a judgment of dismissal on the basis of sovereign immunity, and remand the case for further proceedings.

Respectfully submitted,

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March 31, 1995